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April 27, 2023

The Honorable Wes Moore
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401
Delivered via email

RE: Senate Bill 1, "Criminal Law – Wearing, Carrying, or Transporting Firearms – Restrictions (Gun Safety Act of 2023)"

Dear Governor Moore:

It is our view is that Senate Bill 1 is legally sufficient and is not clearly unconstitutional.[1]

Second Amendment Analysis Under Bruen

Last year, the Supreme Court held, assuming a government regulation at issue applies to conduct falling within the Second Amendment's "plain text," that the government has the burden to justify the firearm regulation by showing the regulation is consistent with the Nation's historical tradition of firearm regulation. *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).[2]

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[1] We apply a "not clearly unconstitutional" standard of review for the bill review process. 71 *Opinions of the Attorney General* 266, 272 n.11 (1986).

[2] The law challenged in *Bruen* was New York's requirement that individuals applying for a permit to carry a handgun outside the home show a special need for self-defense. The legal issue raised was the extent to which the government could regulate an individual's Second Amendment right to keep and bear arms for self-defense, including outside the home.

> [W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Id. In short, the applicable test is "whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *Id*. at 2131.

The Court went on to explain that determination of whether a modern regulation is consistent with a historical one requires "analogical reasoning"; that is, "a determination of whether the two regulations are 'relevantly similar.'" *Id*. at 2132 (citation omitted). And although the Court did not provide "an exhaustive survey" of factors that might make two regulations similar, it indicated that the determination involves "at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id*. at 2133. "[W]hether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in an analogical inquiry." *Id*. (emphasis in original).

At the same time,

> analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check. On the one hand, courts should not "uphold every modern law that remotely resembles a historical analogue," because doing so "risk[s] endorsing outliers that our ancestors would never have accepted." On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.

Id. (emphasis in original; citations omitted). As one court applying *Bruen* explained,

> How, exactly, should those analogies be drawn? It 'may require a ... nuanced approach.'… The court's investigation, therefore, cannot be so simple as just comparing the modern law under review with the laws of a couple of centuries ago, like a redline comparison in a word processing application.

> Rather, the court must engage in a more subtle "consideration of" whether the relevant "modern regulations ... were unimaginable at the founding."
>
> Such an approach is necessary in order for *Bruen* to make sense, because a list of the laws that *happened to exist* in the founding era is, as a matter of basic logic, not the same thing as an exhaustive account of what laws would have been theoretically *believed to be permissible* by an individual sharing the original public understanding of the Constitution. No reasonable person would, for example, think that the legislatures of today have adopted every single hypothetical law capable of comporting with our understanding of the Constitution, such that any law that has not yet been passed simply must be unconstitutional. Accordingly, the court must, based on the available historical evidence, not just consider what earlier legislatures did, but imagine what they could have imagined.

United States v. Kelly, 2022 WL 17336578 (M.D. Tenn. Nov. 16, 2022) at *2 (quoting *Bruen*, 142 S. Ct. at 2132) (emphasis in original).

After outlining the new burden that the government must meet to regulate firearms—that the regulation is consistent with this Nation's historical tradition of firearm regulation—the Court in *Bruen* applied it to New York's "proper cause" requirement and concluded that "[t]he Second Amendment's plain text … presumptively guarantees … a right to 'bear' arms in public for self-defense." 142 S. Ct. at 2135. The Court went on to add that it found no evidence of "a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense" or "limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense." *Id*. Thus, the Court concluded that New York's proper cause requirement was unconstitutional because "it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms." *Id*. at 2156.

Sensitive Locations

The Court in *Bruen* confirmed, however, the government may validly prohibit firearms in some places. "[C]ourts can use analogies to 'longstanding' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings' to determine whether modern regulations are constitutionally permissible." 142 S. Ct. at 2118. Further, the Court held that it is settled that legislative assemblies, polling places, and courthouses are sensitive places. *Id*. at 2133. "And courts can use analogies to those historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible." *Id. See also District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010).

Consequently, there is a presumption that the government may ban firearms in schools, government buildings, legislative assemblies, polling places, and courthouses. Moreover, if the government can make a persuasive case that a new location is relevantly similar to one of the foregoing places in how and why there is a ban, the government can impose a ban in that location. In other words, a location may be banned if it imposes a burden comparable to a historical law. Under *Bruen,*

> (1) schools and government buildings are examples of sensitive places, not the exhaustive list of what sensitive places are; (2) there are only a few Eighteenth-and Nineteenth-Century regulations that altogether prohibited weapons in sensitive places, which are also defined to include legislative assemblies, polling places, and courthouses; (3) banning weapons in sensitive places has a longstanding historical pedigree, which does not violate or run afoul of the Second Amendment; and (4) when necessary, the Court may use analogical reasoning to identify new sensitive places.

United States v. Robertson, 2023 WL 131051 (D. Md. Jan. 9, 2023) at *7 (upholding federal regulation banning firearms on the National Institutes of Health campus).

Senate Bill 1

Senate Bill 1 specifies "sensitive locations" where firearms are not permitted, subject to several exceptions. As such, Senate Bill 1 does not broadly prohibit wearing, carrying, or transporting a firearm. Rather, it prohibits wearing, carrying, or transporting a firearm in identified and defined locations. Specifically, Senate Bill 1 proposes new Criminal Law Article ("CR") provisions that prohibit wearing, carrying, or transporting a firearm in limited defined areas:

- In an area for children or vulnerable adults, proposed CR § 4-111(c), defined in proposed CR § 4-111(a)(2).

- In a government or public infrastructure area, proposed CR § 4-111(d), defined in proposed CR § 4-111(a)(4), where there must be "a clear and conspicuous sign at the main entrance of the building or the part of a building that is owned or leased by the unit of State or local government indicating that it is not permissible to wear, carry, or transport a firearm in the building or that part of the building." Proposed CR § 4-111(d)(2).

- In a "special purpose area," proposed CR § 4-111(e), defined in CR § 4-111(a)(8).

Overall, the specified sensitive places above are limited to (1) areas where children and other vulnerable populations are located, (2) areas where conditions create special risks such as crowded and confined areas and places where alcohol is being consumed, and (3) areas where individuals are exercising other constitutional rights. Proposed CR § 4-111(b) contains 11 exceptions to the foregoing prohibitions in CR § 4-111.

Regarding private property, "[a] person wearing, carrying, or transporting a firearm may not enter or trespass in the dwelling of another unless the owner or the owner's agent has given express permission, either to the person or to the public generally, to wear, carry, or transport a firearm inside the dwelling." Proposed CR § 6-411(c). "Dwelling" is narrowly defined as "[a] building or part of a building that provides living or sleeping facilities for one or more individuals." Proposed CR § 6-411(a)(2)(i). "Dwelling" does not include common areas of condominiums, cooperative housing, or multifamily housing. Proposed CR § 6-411(a)(2)(ii).

> Moreover, a person wearing, carrying, or transporting a firearm may not:
>
> (1) enter or trespass on property unless the owner or the owner's agent has posted a clear and conspicuous sign indicating that it is permissible to wear, carry, or transport a firearm on the property; or
> (2) enter or trespass on property unless the owner or the owner's agent has given the person express permission to wear, carry, or transport a firearm on the property.

Proposed CR § 6-411(d). Proposed CR § 6-411(b) lists 6 exceptions to the private property prohibitions.

Thus, Senate Bill 1 provides that for one's dwelling, consistent with the longstanding concept of trespass, the default rule is that there is no right to bring a firearm onto such private property without the owner's or agent's permission. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (reiterating that the right of property owners to exclude others from using or interfering with their property is "universally held to be a fundamental element of the property right" and "one of the most essential sticks in the bundle of rights that are commonly characterized as property"). On the other hand, for private property open to the public, the default is that a properly permitted individual could carry a firearm onto the private property unless the owner expressly prohibits it, which is the owner's right. *Lloyd Corp. v. Tanner*, 407 U.S. 551,569 (1972) (noting that "[t]he essentially private character of a store ... does not change by virtue of being large or clustered with other stores in a modern shopping center"); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (reaffirming that property does not "lose its private character merely because the public is generally invited to use it for designated purposes").

One scholar who analyzed court decisions since *Bruen* has concluded that the "trek through the burgeoning case law shows that lower courts are fractured. They have reached divergent conclusions about the constitutionality of major state and federal laws." Charles, Jacob D., "The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History" (January 23, 2023). *Duke Law Journal*, Vol. 73 (forthcoming).[3] Nevertheless, it is our view that Senate Bill 1's approach is consistent with the permissible boundaries set out in *Bruen* and other federal courts applying *Bruen*. The legislative record contains testimony from legislators as well as from experts and advocates outlining the public safety rationale for the modified approach for the State's firearms policy. Further, the legislative record contains statements supporting that Senate Bill 1's regulations impose a comparable burden to historical analogues. Thus, we believe that Senate Bill 1 is not clearly unconstitutional.[4]

Sincerely,

Anthony G. Brown

AGB/SBB/kd

cc: The Honorable Susan C. Lee
Eric G. Luedtke
Victoria L. Gruber

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3 Available at http://dx.doi.org/10.2139/ssrn.4335545.

4 Section 2 of Senate Bill 1 contains a severability clause.